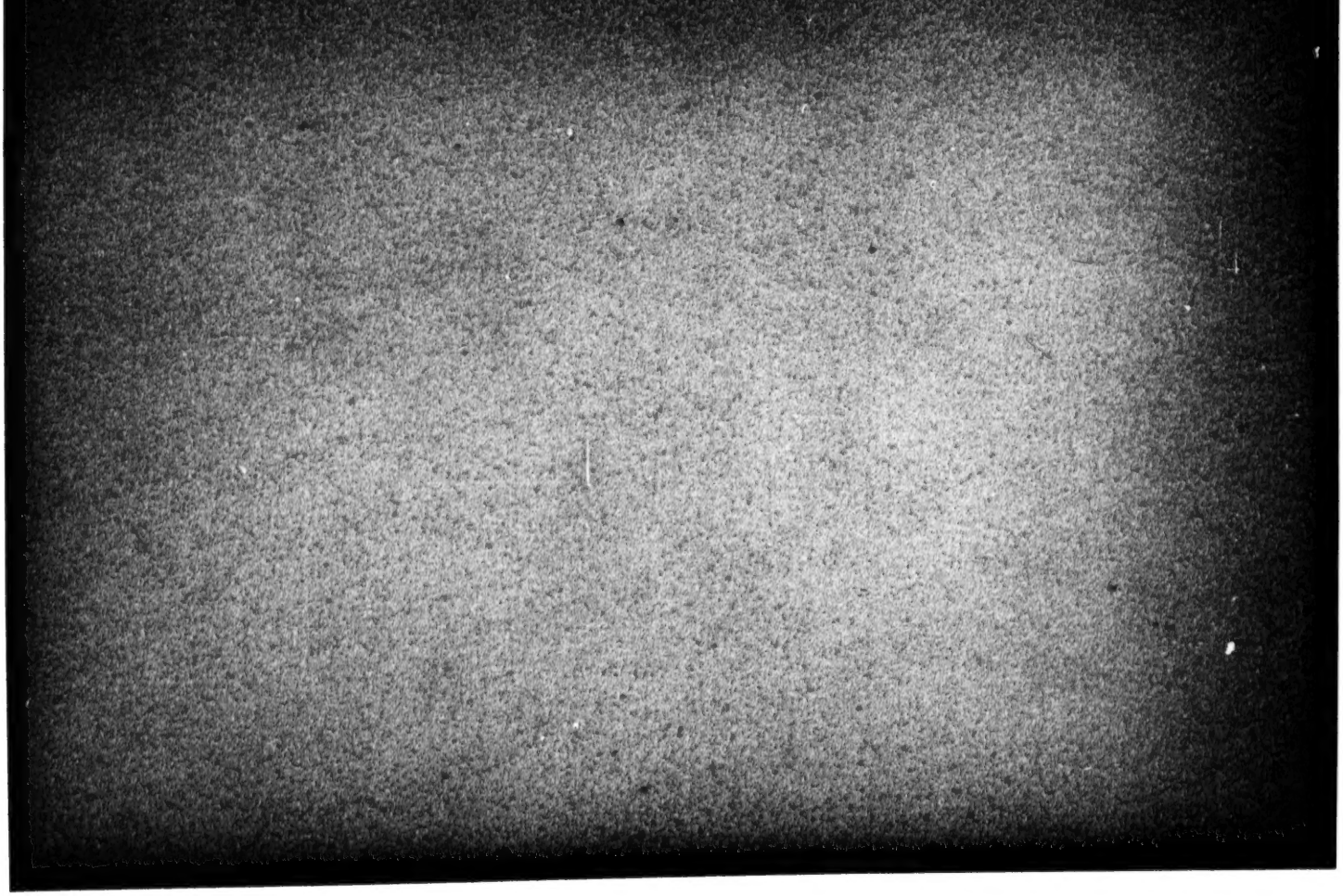

SUPREME COURT, U. S.

FEB 21 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-631

HOWARD JOHNSON COMPANY, INC.,
Petitioner,

vs.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* on behalf of Petitioner in the instant case.*

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* The Petitioner has consented to the Chamber's participation in the instant case. Respondent, by its Counsel, requested a copy of the Chamber's brief as a condition precedent to Respondent's

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The instant case raises issues of fundamental importance for a significant number of the Chamber's members in the ordinary conduct of their businesses.

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determination as to whether it would give its consent to the Chamber's participation herein. On Monday, February 11, 1974, a copy of a draft of the Chamber's proposed brief was mailed to Counsel for Respondent. On Thursday, February 14, 1974, Respondent's Counsel having studied the submitted draft, notified Attorneys for the Chamber that Respondent would not consent to the Chamber's participation as *amicus curiae* herein. The final version of the Chamber's brief accompanying the instant motion is in no material respect different from the draft forwarded to Respondent's Counsel on February 11.

** *E.g., Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554; *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court). No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

The questions presented for review are, first, whether an employer who purchases the assets of an ongoing enterprise may be compelled to arbitrate with a union under the terms of a collective bargaining agreement negotiated between the seller and the union; and, second, whether an employer who purchases the assets of an ongoing enterprise is a "successor" employer even though a majority of its employees were never employed by the predecessor employer nor are members of the union which represented the predecessor's employees. The instant case thus involves a direct conflict between the rationale and policy considerations underlying this Court's decisions in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964), which focused on the continuation of the successor's duty to arbitrate under a predecessor's contract, and *N. L. R. B.* v. *Burn's International Security Services, Inc.*, 406 U. S. 272 (1972), which declared a successor free of the constraints of his predecessor's contract. This case therefore calls into question the continuing validity of *Wiley*. This matter is of national concern because the ability of employers generally to invest in marginal businesses and make changes in personnel, practices and policies necessary to make such marginal businesses productive is unduly restricted by compelling them to arbitrate under the terms of the predecessor's labor agreement.

Since the Chamber's membership consists of numerous employers who frequently and regularly are in a position to acquire or sell ongoing businesses, and who must therefore know what their rights and duties are, the Chamber is vitally concerned about the manner by which these questions will be resolved by this Court. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the questions involved herein which might not otherwise be advanced by the parties and which have not been advanced in their briefs.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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TABLE OF CONTENTS.

	PAGE
Interest of the Amicus	1
Summary of Argument	2
Argument	3
I. As a Result of This Court's Decision in *N. L. R. B.* v. *Burns International Security Services, Inc.*, *John Wiley & Sons* v. *Livingston* Is No Longer Viable and Should Be Overruled	3
A. The Rationale of *Wiley* and That of *Burns* Are Irreconcilable and Cannot Logically Be Accommodated	5
B. Perpetuation of a Uniform National Labor Policy Requires Uniformity of Obligation Under the Law; the Continued Co-Existence of *Wiley* and *Burns* Is Destructive of That Policy	7
1. *Wiley* Cannot Be Maintained on Policy Grounds	8
2. The Obligation Imposed on a Successor by *Burns* Comports with the Objectives of Congressional Policy as Expressed in the Act	13
II. An Employer Does Not Become a Successor, and the Obligations of Successorship Do Not Mature Unless and Until a Majority of Those Persons Hired by the Employer Are Either Former Employees of the Predecessor or Members of the Union	16
A. Continuity of Majority Status Among the Labor Force Is a Necessary Element to the Establishment of Successorship Status; Neither the Board Nor the Federal Courts, in Either Proceedings to Enforce Board Decisions or Suits to Compel Arbitration, Find an Employer to Be a Successor When This Element Is Not Present	17
B. The Time for Determining Majority Status Among the Work Force Is When the Employer Has Hired Its Full Complement of Employees	20
Conclusion	22

TABLE OF AUTHORITIES CITED.

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Bachrodt Chevrolet Co., 186 NLRB No. 151 (1970), *Enforced in Part*, 486 F. 2d 963 (CA 7, 1972), *Vacated and Remanded* 411 U. S. 912, 205 NLRB No. 122 (1973) 22

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Firchau Logging Co., 126 NLRB 1215 (1960) 18

Garner v. *Teamsters Local 766*, 346 U. S. 485 (1953) .. 9

General Motors Corp., 191 NLRB No. 149 (1971) 15

Golden State Bottling Co. v. *N. L. R. B.*, 94 S. Ct. 414 (1973) 15

Hecker Machine, Inc., 198 NLRB No. 161 (1972) 18

Howard Johnson Co., 198 NLRB No. 98 (1972) 18

Illinois Malleable Iron, 120 NLRB 451 (1958) 20

Milwaukee Engine & Equipment Corp., 198 NLRB No. 56 (1972) 18

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N. L. R. B. v. *Burns International Securities Services, Inc.*, 406 U. S. 272 (1972) ..2, 3, 4, 5, 6, 7, 8, 9, 10,11, 12, 14, 16, 19

N. L. R. B. v. *Colten*, 105 F. 2d 179 (CA 6, 1939) 17

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N. L. R. B. v. *Wayne Convalescent Center*, 465 F. 2d 1039 (CA 6, 1972) 21

Parkwood IGA, 201 NLRB No. 141 (1973) 18

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Printing Specialties Union No. 477 v. *Pride Papers Aronson Bros. Paper Corp.*, 445 F. 2d 361 (CA 2, 1971).. 19

San Diego Building Trades Council v. *Garmon*, 395 U. S. 236 (1959) 9

Tallakson Ford, Inc., 171 NLRB No. 67 (1968) 18

Teamsters Local 174 v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 8, 9

Textile Workers v. *Lincoln Mills*, 353 U. S. 488 (1957) 6, 7, 8, 9

United States Gypsum Co. v. *United Steelworkers*, 384 F. 2d 38 (CA 5, 1967) *cert. denied* 389 U. S. 1042 (1968) 19

United Steelworkers v. *American Mfg. Co.*, 363 U. S. 564 (1960) 8, 9

United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 8, 10

United Steelworkers v. *Reliance Universal Inc.*, 335 F. 2d 801 (CA 3, 1964) 19

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960) 8

Wackenhut Corp. v. *United Plant Guard Workers of America*, 332 F. 2d 954 (CA 9, 1964) 19

John Wiley & Sons, Inc. v. *Livingston*, 376 U. S. 543 (1964) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 19

Statutes.

Labor Management Relations Act, 29 U. S. C. Section 141, *et seq.*

Section 8(a)(3) 15
Section 8(a)(5) 4, 8
Section 8(d) 7, 8, 9
Section 9(a) 19
Section 301 4

Miscellaneous.

Doppelt, *Successor Companies: The N. L. R. B. Limits the Options and Raises Some Problems*, 20 DePaul L. Rev. 176 (1971) 6

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the *amicus curiae* is set forth at pages 2, 3 of the foregoing Motion.

SUMMARY OF ARGUMENT.

I.

The instant case brings two decisions of this Court into direct conflict. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) is based on the theory that an agreement to arbitrate contained in a labor agreement negotiated by a labor organization and an employer survives the collective relationship that gave it life and thus serves to compel a successor employer, who was not a party to the agreement, to honor that agreement. *N. L. R. B.* v. *Burns International Securities Services, Inc.*, 406 U. S. 272 (1972) is based on this Court's conclusion that the substantive terms of a collective bargaining agreement do not survive the relationship between the labor organization and employer who negotiated it, and a successor employer is under no obligation to honor its terms. These two theories are irreconcilable, and their combined coexistence fosters inconsistent application of the federal labor laws contrary to Congressional design and mandates of this Court.

The perpetuation of *Wiley* leads to results inconsistent with objectives of national labor policy in contrast to *Burns* which, by giving effect to the basic principle of free collective bargaining, properly balances the rights of all parties and achieves consistency with the overall purpose of the Act. In light of *Burns*, *Wiley* is no longer valid and should be overruled.

II.

Even if this Court should decline to overrule *Wiley*, the standard for determining successorship status should be the same regardless of forum. This Court, the lower courts and the Board require that a majority of an employer's work complement consist of former employees of the successor, or other persons represented by the Union, before an employer becomes a successor. Until an employer meets this test for successorship, he is under no obligation that devolves upon that status.

ARGUMENT.

I.

AS A RESULT OF THIS COURT'S DECISION IN N. L. R. B. v. BURNS INTERNATIONAL SECURITY SERVICES, INC., JOHN WILEY & SONS v. LIVINGSTON IS NO LONGER VIABLE AND SHOULD BE OVERRULED.

In *John Wiley & Sons* v. *Livingston*[1] this Court held that an employer who acquired a business by merger could be compelled to honor the arbitration provisions of a collective bargaining agreement that had been negotiated by its predecessor but which the successor employer had not agreed to assume. And, while the Court only held that the successor was required to honor the arbitration provisions of the agreement, it expressly indicated that under its holding the arbitrator could find that substantive terms of the agreement survived the merger,[2] and the successor could therefore be compelled to honor them. In *N. L. R. B.* v. *Burns International Security Services, Inc.*,[3] this Court held that the National Labor Relations Board could not compel a successor employer to honor the substantive terms of a collective bargaining agreement entered into by its predecessor employer.

In the instant case, a suit to compel arbitration, the Sixth Circuit below, finding the Petitioner to be a successor,[4] deter-

1. 376 U. S. 543 (1964).

2. 376 U. S. at 555.

3. 406 U. S. 272 (1972).

4. The Sixth Circuit below held that Howard Johnson was a successor to Grissom despite the fact that the majority of Howard Johnson's employee complement were neither former employees of Grissom nor members of Respondent Union. This determination is erroneous because regardless of whether a successor's obligation is to arbitrate or merely to bargain the existence of successorship status should be judged by the same criteria. This issue is discussed

mined that Petitioner must submit to arbitration under the predecessor's labor agreement with Respondent, wherein the arbitrator could, under the authority of *Wiley*, compel Petitioner to honor substantive terms of that agreement. The Court below recognized the inherent inconsistency between the rationale of *Wiley* and that of *Burns* but attempted to reconcile them. The Court reasoned that while *Wiley* was an action under Section 301[5] of the Act[6] to enforce the arbitration provisions of a collective bargaining agreement, *Burns* involved a National Labor Relations Board proceeding for refusal to bargain with respect to a collective bargaining agreement[7] and that *Burns* merely rejected the Board's authority to require the employer to honor all the substantive terms of the agreement while leaving undisturbed the arbitrator's authority, under *Wiley*, to determine which of the substantive terms the successor should be required to honor.

Wiley and *Burns* are not so easily accommodated. They are logically irreconcible and their continued co-existence permits a dichotomy that threatens to unravel the fabric of uniformity

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at Part II of the Chamber's brief, *infra*. However, the Sixth Circuit's decision with respect to the existence of successorship status is based on its view that the obligation to arbitrate imposed on a successor by *Wiley* is not negated by *Burns*. The decision below thus raises the question, posed by the conflict between *Wiley* and *Burns*, of whether the *Wiley* imposed obligation to arbitrate can co-exist in light of *Burns*, irrespective of the criteria used to determine successorship status.

5. Sec. 301, Labor Management Relations Act, 29 U. S. C. Sec. 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees employed in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amounts in controversy or without regard to the citizenship of the parties."

6. Labor Management Relations Act, as amended, 29 U. S. C. Sec. 141, *et seq.*

7. Sec. 8(a)(5), 29 U. S. C. 158(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . "

that Congress has sought and that this Court has directed in the establishment and enforcement of a national labor policy. The obligation imposed on a successor employer by *Burns* comports with that policy in all respects and renders *Wiley* without purpose or reason for continued existence within the body of Federal Labor Law.

A. The Rationale of Wiley and That of Burns Are Irreconcilible and Cannot Logically Be Accommodated.

Wiley is based on the theory that the arbitration provisions of the predecessor's labor agreement survive the transaction by which the new owner or operator of the business succeeds as the employing entity. The successor is at least bound to honor the arbitration terms of the contract, and, as a result of the arbitrator's decision, some or *all* of the substantive terms of the agreement could also "survive" and be imposed on the successor by the arbitrator. Under *Burns*, the predecessor's labor agreement does not survive; since the contract does not survive, the successor is under no cumpulsion to honor any of its substantive terms. As a matter of pure logic, these two theories cannot be reconciled. Under the *Wiley* theory of "selective survival" the successor is compelled indirectly to do that which under *Burns* he has no duty to do.

The Court below suggests that the conflict is not irreconcilible and that this Court did not intend to "eviscerate" *Wiley* because this Court, in *Burns*, only rejected the Board's theory that all the substantive terms of the contract survive; that it did not reject the theory that through the process of "selective" survival some or *all* of the same terms might survive. There is no rational distinction between survival of the agreement *in toto* or survival of the agreement "selectively". Indeed, the contention made by the Board in *Burns* is a logical extension of the *Wiley* rationale,[8] and this Court in its *Burns* decision rejected it.

8. See Feller, *Change of Ownership and Representation Problems: A Union Counsel's View*, Proceedings of New York Uni-

Some commentators,[9] in attempting to reconcile the conflict in rationale between *Wiley* and *Burns*, have suggested that *Wiley* is merely an exception to this Court's long adherence to the principle that freely negotiated agreements, without compulsion or duress, are the sound basis for establishing stable bargaining relationships and preventing industrial strife.[10] In *Burns* even this Court, in reasserting the voluntary nature of the collective bargaining agreement, distinguished *Wiley* as a "[L]imited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes. . ." whose ". . .[N]arrower holding dealt with a merger occurring against a background of state law. . ." *Id.*, at 286.

However, the *Wiley* rationale is not so limited. On the authority of *Lincoln Mills*,[11] the *Wiley* Court rejected the Union's reliance upon the State law governing mergers as having any significance to the determination of the successor's obligation, concluding that "federal law, fashioned 'from the policy of our national labor laws', controls."[12] *Wiley, supra*, at 548.

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versity 18th Conference on Labor 275 (Christensen ed., 1966); Doppelt, *Successor Companies: The N. L. R. B. Limits The Options And Raises Some Problems*, 20 DePaul L. Rev. 176 (1971).

9. See Note, *Contractual Successorship: The Impact of Burns*, 40 U. Chi. L. Rev. 617 (1973); Swerdlow, *Freedom of Contract in Labor Law*, 51 Tex. L. Rev. 1 (1972).

10. In *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), wherein this Court upheld the Constitutionality of the National Labor Relations Act, The Court stated:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . The theory of the Act is that full opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not compel." *Id.*, at 45.

11. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

12. *Wiley* is clearly not limited just to mergers in states where the corporation laws provide for the surviving Company to assume the obligations of the disappearing company. In *Wiley* the Court stated: "[T]his is so as much in cases like the present, where the contracting employer disappears into another by merger, as those

Thus, as a matter of federal labor law, the *Wiley* Court determined that a collective bargaining agreement is not the "simple product of a consensual relationship", and that notwithstanding the fact that a successor is not a party to the agreement, it is compelled to arbitrate under it and, therefore may be required to honor its substantive terms.

In essence, *Wiley* creates a fiction of "survival". In *Burns*, this Court rejected the fiction. The *Wiley* fiction cannot logically be reconciled with *Burns*.

B. Perpetuation of a Uniform National Labor Policy Requires Uniformity of Obligation Under the Law; the Continued Co-Existence of Wiley and Burns Is Destructive of That Policy.

If the fiction of *Wiley* is to be maintained it can only be maintained at the expense of the uniformity that Congress and this Court have sought in the creation and enforcement of a national labor policy. In *Lincoln Mills, supra,* this Court held that Congress directed the Courts to fashion a federal law "from the policy of our national labor laws." *Wiley* gives effect to the policy favoring arbitration. *Burns* emphasizes the strong preference of national labor policy for voluntary agreements. In terms of the obligations imposed on a successor employer, the co-existence of these two policies results in a dichotomy.

As a result of a Section 301 suit, a successor may be compelled to accept some or all of the terms of an agreement which it did not negotiate, contrary to the specific language of Section 8(d).[13] The objective of national labor policy,—the prevention

in which *one owner replaces another but the business entity remains the same." Id.*, at 549.

13. Section 8(d), 29 U. S. C. 158(d) provides:

"For purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other items and conditions of employment, or the negotiations

of industrial strife through collective bargaining,—is not fostered by such a dichotomy,[14] and this Court must decide whether, in light of *Burns*, *Wiley* any longer serves that object.

1. Wiley Cannot Be Maintained on Policy Grounds

In *Burns*, this Court was presented with the question of whether agreement by compulsion or the process of freely negotiated agreement better serves the objectives of collective bargaining. The same considerations of policy are involved in the instant case since the question involved herein is whether the national labor policy is better served by what is in essence compulsory arbitration or by freely negotiated agreements. Reflection on the Congressional purpose of Section 8(d) compelled this Court to state in *Burns* that: "Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or *voluntary* arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." *Burns, supra,* at 282. The key word is "voluntary," because nothing contained in the body of federal law fashioned under Section 301 (except *Wiley*), sanctions the *compulsion* of collective bargaining terms. *Lincoln Mills, Lucas Flour* and the *Trilogy*[15] do not sanction it because those cases involved the enforcement of covenants to arbitrate *voluntarily* undertaken by the parties who negotiated the agreements.

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of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*" (Emphasis added)

14. In *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling." *Id.*, at 103-104.

15. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *United Steelworkers* v. *Carrier & Gulf Nav. Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960).

Further, the distinction, drawn by the Court below, that the policy against compulsion expressed in 8(d) only serves as a restriction on the Board and not on the courts, is unsupportable. It is a distinction based on form, not substance. In terms of the policy reflected in Section 8(d) there is no reason why a successor employer's obligation should differ depending upon the Union's choice of forum. Such "forum shopping" will inevitably result if *Wiley* is not overruled. Thus, when a union desires the retention of a predecessor's contract, the union would sue to enforce its terms or the duty to arbitrate pursuant to its terms under Section 301. That would be the legacy of *Wiley*. If the union elected instead to negotiate a new agreement with the successor, then the union would pursue its rights under Section 8(a)(5) of the Labor Act, the end result of which would be an order to the successor to bargain anew. The successor employer, however, would have no such option, but would be wholly subject to the union's preferences. This unfortunate result is clearly contrary to this Court's decisions which have stressed the necessity for decisional uniformity in the area of labor relations.[16]

Moreover, such a restricted view of Section 8(d), which might on the surface appear to reconcile *Wiley* and *Burns*, misconceives the role of arbitration within the collective bargaining process. Arbitration is not the sole objective of national labor policy. It is "part and parcel" of the policy to "promote industrial stabilization through the collective bargaining process,"[17] and this is reflected in the literal language of Section 8(d).[18] In

16. E.g., *Lincoln Mills, supra; Lucas Flour, supra; San Diego Building Trades Council* v. *Garmon*, 395 U. S. 236 (1959); *Garner* v. *Teamsters Local 766*, 346 U. S. 485 (1953).

17. *American Mfg. Co., supra* at 578.

18. Section 8(d) provides in relevant part:
"[T]o bargain collectively . . . is to meet . . . and confer . . . with respect to . . . an agreement *or any question arising thereunder* . . . "
Arbitration, as the final step of that procedure, is thus within the ambit of Section 8(d).

Wiley this Court acknowledged that preference for the policy of arbitration could be overcome by other compelling considerations. In *Burns* it is recognized that the freedom to contract is such a compelling force. In terms of policy, *Burns* condemns all official compulsion,[19]—whatever the source. *Wiley*, on the other hand, permits official compulsion. The federal courts, through the means of the arbitration process, may compel a successor employer to honor the terms of an agreement to which it was never a party. In this respect, *Wiley* permits indirectly what *Burns* prohibits directly, and in so doing alters the traditional role of arbitration.

In traditional arbitration cases both the authority and the role of the arbitrator stem from and are circumscribed by the arbitration clause. His function is to interpret the terms of the agreement in accordance with the express intentions of the parties in light of their bargaining history and the arbitrator's experience in the industry:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra* at 587.

Where a successor, under *Wiley*, is compelled to arbitrate pursuant to the predecessor's contract, the arbitrator does not interpret an existing agreement because it does not "survive" and devolve on the successor employer. Rather, he decides what the terms of the agreement are which will then be binding upon the successor. In such a situation, the arbitrator, therefore, contrary

19. "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *Burns, supra* at 287, quoting *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970).

to his legitimate role "dispenses his own brand of industrial justice" based on his own belief to as the equities involved. The arbitrator may refuse to bind the successor to the terms of the predecessor's agreement; he may bind the successor, or he may "re-write" the terms. Contrary to the assertion of the Sixth Circuit below, this arbitral "flexibility" in the successorship situation mandates *Wiley's* reversal in light of *Burns*. The arbitrator is permitted to perform a judicial function, *i.e.*, to decide if there is an agreement, what its terms are, and bind the successor to them. Not only is this a judicial function contrary to the arbitrator's legitimate role,[20] but it is conduct in which the court could not engage.[21]

Nor is the existence of *Wiley* necessary to perpetuate the valued role of arbitration within the collective bargaining process since that value is premised on the encouragement of parties to create a voluntary framework for the resolution of their disputes according to their own needs, problems and interests and their own voluntary assumption, through negotiations, of obligations and duties based on those needs, problems and interests. Therefore, if a successor employer agrees to arbitration under the terms of his predecessor's labor agreement, his undertaking, being voluntary, will necessarily contribute to the avoidance of

20. The late Dean Shulman, in his treatise, *Reason, Contract and Law on Labor Relations*, 68 Harv. L. Rev. 999 (1955) stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a system of self-government created by and confined to the parties." *Id.*, at 1016.

21. While *Burns* dealt with Board-ordered compulsion, it is clear that the policy expressed in *Burns* extends to court-ordered compulsion as well. Even the *Wiley* court rejected the contention that a federal court could properly compel a successor to agree to the substantive terms of the predecessor's agreement. The AFL-CIO as *amicus curiae* in *Wiley* urged the court to adopt such a rule. Brief for AFL-CIO as *Amicus Curiae*, at pages 8-22, *Wiley supra*. The Court, of course, did not so rule.

labor disputes. On the other hand, forcing an employer to order his affairs according to a contract not geared to his needs and problems and not voluntarily entered into by him is contrary to the basic premise underlying arbitration and the free collective bargaining process of which it is a part. Rather than contributing to the construction of a productive bargaining relationship, such compulsion tends to obstruct such a relationship because of the future effect of an arbitration award on the relationship.

Arbitration serves as precedent for the parties in that an award governs the future treatment by the employer of the employment condition involved in the arbitration, *i.e.* a decision interpreting a given provision of an agreement contrary to the employer's contention requires the employer to alter the practice which gave rise to the dispute in accordance with the arbitrator's interpretation as to the proper practice called for under the disputed contractual provision. Thereafter, the employer must continue, until the contract expires, to govern his affairs with respect to the subject matter of the dispute in the manner defined by the arbitrator. In the successorship situation, the successor employer is no more free to ignore this precedential effect of an arbitration award as is the employer in the traditional arbitration case. The successor must implement the practice called for by the award. The implementation of the arbitrator's decision thereby becomes an employment condition which governs the parties' relationship with respect to that condition. Their future freedom to order their relationship with respect to that matter in a way that reflects the needs of the new relationship is, to that extent, precluded. A relationship based on compulsion rather than on freedom of the parties to make necessary adjustments reflective of their needs certainly does not contribute to the avoidance of industrial strife. The lingering effect of *Wiley* is to compel the creation of such relationships—relationships which do not have the enduring basis upon which stability is built and strife is avoided.

2. The Obligation Imposed on a Successor by Burns Comports with the Objectives of Congressional Policy as Expressed in the Act.

In giving effect to the Congressional policy favoring contractual freedom, this Court has realistically understood that the best means for achieving stability in employer-union relationships and thereby preventing industrial strife is through the give and take process of bargaining, not on judicially imposed obligations unrelated to the realities of the parties' new situation. In *H. K. Porter, supra,* the Court stressed that Congress was aware that the Act could not in all cases ensure against the industrial strife and work stoppages that often result from labor disputes. In balancing the interests favoring preventing such disruptions by compelling parties to reach agreement or by providing for contractual liberty, Congress chose the latter, recognizing that stability in industrial relations can only result if the parties have the freedom to order their relationship according to their own needs and strengths. Indeed, this Court's decision in *Porter* is premised on Congress' desire that parties' freedom to order their own industrial destinies shall not be compromised by imposed solutions to their problems which they have not knowingly and voluntarily undertaken. The decision in *Burns* is a necessary corollary.

Further, in the successorship situation, stability is achieved by encouraging the continuation of an on-going business and, to the extent possible, retention of the work force. Certainly, any policy which discourages employers from taking over failing businesses does a disservice not only to the employers involved but to the employees and the union as well; if a failing employer is unable to find a successor, the net result is the loss of jobs for all the employees.

Removing the shackles of forced contractual obligations encourages an employer to take over such enterprises since they can then be managed in a competitive and business-like man-

ner.[22] *Wiley* retains those shackles and thus discourages such efforts. Similarly, the freedom from prior contractual obligations also gives the union the necessary flexibility to meet the needs of the new bargaining relationship and reorder the parties' relationship to the advantage of its employee-members.[23]

Moreover, *Burns* is based on the very premise that underlies the entire Act, i.e., the obligation of an employer to bargain stems from the collective choice of a majority of *its* employees. It is the rights of the employees, after all, that the Act seeks to protect, and *Burns* protects those legitimate rights. Under *Burns*, a successor employer is obligated to bargain with the union if a majority of its employees were employees of the predecessor, or have in some manner—as through Board certification—expressed their desire to be represented by the union. The employees may receive better terms and conditions of employment under a new contract than they enjoyed under the predecessor's. Of course, they may not. But, in balancing the rights of all concerned, *Burns* recognizes that given the economic realities of the business world, the protections of the Act cannot guarantee more than the right to require the employer to bargain in good faith. If the employer cannot economically meet the demands of the union even arbitration cannot compel it to do so.

Finally, the *Burns* rule accords due consideration to the legitimate rights of employees. First of all, an employee has no right to continuing employment with the successor, and he or she, therefore, has no rights attendant to the employment

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22. "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, and nature of supervision. Saddling such an employer with terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and discourage and inhibit the transfer of capital." *Burns, supra,* at 288.

23. "On the other hand, a union may have made concessions to a small and failing employer that it would be unwilling to make to a large or economically successful firm." *Ibid.*

relationship.[24] An employee not hired by the successor may have outstanding claims or grievances against the predecessor, but that employee is protected against the predecessor's failure to resolve the matter since the predecessor is obliged under the Act to bargain with the union over the effects of going out of business. *General Motors Corp.*, 191 NLRB No. 149 (1971).[25] Further, if the successor should refuse to hire an employee of the predecessor in order to defeat the union's majority, such conduct would constitute a discriminatory refusal to hire in violation of Section 8(a)(3) of the Act.[26] Those employees of the predecessor whom the successor does hire have the same protection under the *General Motors* case, *supra*, to require the *predecessor* to remedy outstanding grievances, but as clearly set forth in *Burns*,[27] the obligations imposed under the predcessor's contract do not devolve on the successor, and it is free to set its initial terms and conditions of employment, subject to the obligations to bargain.

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24. "[From the Board's contention] It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor." (footnote omitted) *Burns, supra*, at 289, rejected the proposition that a successor employer is so obligated.

25. While it may be argued that the protection afforded under the Act in this regard may not in every instance be adequate since the predecessor, having gone out of business, may be bankrupt or in some manner judgment-proof, the law can never guarantee that a judgment will be collected. However, the Board has gone to great lengths to finally recover judgment in pursuit of its decisions. See, *e.g.*, *N. L. R. B.* v. *Deena Artware, Inc.*, 310 F. 2d 470 (CA 6, 1962), where the Board persevered for ten years in order to secure employees' monetary entitlement.

26. So also, is the successor required to remedy the unremedied unfair labor practices of its predecessor of which it had knowledge. *Golden State Bottling Co.* v. *N. L. R. B.*, 94 S. Ct. 414 (1973).

27. See footnote 24, *supra*.

If, on balance, this Court felt that the policy favoring contractual freedom did not equitably protect the rights of all concerned and effectuate overall Congressional design, *Burns* would have struck a balance that did not so clearly conflict with the logic and policy considerations of *Wiley*. However, *Burns* does reject *Wiley and* compels that it be overruled.[28]

II.

AN EMPLOYER DOES NOT BECOME A SUCCESSOR, AND THE OBLIGATIONS OF SUCCESSORSHIP DO NOT MATURE UNLESS AND UNTIL A MAJORITY OF THOSE PERSONS HIRED BY THE EMPLOYER ARE EITHER FORMER EMPLOYEES OF THE PREDECESSOR OR MEMBERS OF THE UNION.

Even if this Court should find that *Wiley* and *Burns* can be accommodated and that a successor employer may be compelled to arbitrate matters arising under the terms of the predecessor's labor agreement, the standard for determining when

28. It appears to the *Amicus* that the only possible respect in which *Wiley* might survive *Burns* is with regard to grievances of employees of the predecessor who are subsequently hired by the successor if those grievances resulted from conduct occurring prior to the sale of the business and if the grievance is of the type that cannot be remedied by the predecessor. Certainly, the successor is under no obligation to arbitrate the grievance of an individual whom the successor never employs and which arose from an employment relationship in which the successor played no part. Further, the successor should be under no obligation to arbitrate with respect to a matter which arose prior to the change in ownership and which can be remedied by the predecessor, *e.g.*, a monetary award. However, even with respect to the grievance of an employee whom the successor hires and which arose prior to the successor's takeover of the business and which cannot be remedied by the predecessor, it is doubtful that the successor can be compelled to arbitrate that matter without doing violence to the teachings of *Porter* and *Burns, supra*. Since, as a result of the arbitration, the successor could be compelled to honor the terms of the predecessor's agreement and because of the consequent precedential effect of such arbitration on the successor's freedom to establish his own initial employment terms through bargaining, *Wiley* cannot readily be accommodated with *Burns* even in this limited respect.

an employer becomes a successor and thus when his obligations, either to arbitrate or merely to bargain, mature should be the same irrespective of whether the question is raised in a Section 301 suit or a Board proceeding. The Sixth Circuit below found the Petitioner to be a successor despite the fact that a majority of the Petitioner's work force were never employed by the predecessor nor were members of the union, nor in any manner expressed their desire to be represented by the union. The Sixth Circuit's finding of successorship under this circumstance is contrary to settled law and sound policy and cannot be maintained.

A. Continuity of Majority Status Among the Labor Force Is a Necessary Element to the Establishment of Successorship Status; Neither the Board Nor the Federal Courts, in Either Proceedings to Enforce Board Decisions or Suits to Compel Arbitration, Find an Employer to Be a Successor When This Element Is Not Present.

The successorship doctrine, tracing back over thirty years, is of Board origin.[29] As the criteria for determining the existence of successorship status developed under Board law, although the Board has held that no one factor is determinative, one factor has been virtually indispensible to the finding of successorship—a majority of the new employer's work force must have been employed by the predecessor and represented by the union which claimed majority status.[30] In *Burns* this Court recognized con-

29. See *N. L. R. B.* v. *Colten*, 105 F. 2d 179 (CA 6, 1939).

30. "Of fifty-nine cases decided by the Board in the past twenty years in which the question of successorship for bargaining purposes was presented, in fifty-one the alleged successor had a work force composed of a majority of employees who had worked for a unionized predecessor. In all but four of these the Board found the new employer to be a successor for bargaining purposes. The presence of a majority of such employees virtually guarantees that the Board will find the new employer to be a successor.

The converse is even more well settled: an employer, a majority of whose work force is not composed of persons em-

tinuing majority representation as a necessary element of successorship status:

> "Burns' obligation to bargain with the union over terms and conditions of employment stems from its hiring of Wackenhut's employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer." *Burns* at 270.[31]

And, in cases following *Burns*, the Board has continued to require the element of continued majority representation.[32]

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ployed by its predecessor, will not be found a successor for bargaining purposes. Over the same twenty year period, the Board found a new employer to be a successor only twice in such circumstances, and the later finding was reversed by the Court of Appeals for the Ninth Circuit, whose opinion the Board has subsequently cited with approval." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 794-95 (1969).

The case referred to by Professor Goldberg, reversed by the Ninth Circuit, is *N. L. R. B.* v. *John Stepp's Friendly Ford*, 338 F. 2d 833 (CA 9, 1964), cited with approval by the Board in *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968) and *Federal Electric Corp.*, 107 NLRB No. 63 (1968).

The second case in which the Board found successorship despite the absence of a majority of the predecessor's employees was *Firchau Logging Co.*, 126 NLRB 1215 (1960). However, in *Firchau* the employer hired 30 of 62 of the predecessor's employees, and at the time of the union's demand for recognition, which was made during the certification year, the union demonstrated its continued majority status through 43 union authorization cards.

31. The Court's citation to decisions of the Courts of Appeals is omitted. Those cases, and others, clearly establish that the Courts of Appeals have found the element of majority status necessary to enforce the Board's bargaining orders on "successors."

32. See, e.g., *Parkwood IGA*, 201 NLRB No. 141 (1973); *Hecker Machine, Inc.*, 198 NLRB No. 161 (1972); *Howard Johnson Co.*, 198 NLRB No. 98 (1972); *Crotoan Service Corp.*, 200 NLRB No. 97 (1972); *Milwaukee Engine & Equipment Corp.*, 198 NLRB No. 56 (1972).

Further, the Circuit Courts, following *Wiley*, have considered the element of hiring of a sufficient number of the predecessor's work force to constitute a majority of the new work force an essential factor in establishing the continuity of enterprise necessary to impose the obligation to arbitrate on the new employer in Section 301 suits.[33]

Clearly, there is no basis in precedent, either under Board proceedings or actions under Section 301, for finding successorship status when the element of majority status among the new employer's work force is not present. The obligation to bargain with a union, of which arbitration is "part and parcel", is founded upon the principle that a majority of the employer's employees have selected the union to bargain collectively for them.[34] If the union does not represent a majority of the employer's employees in an appropriate bargaining unit, the employer is under no obligation to bargain with the union. Indeed, if a successor employer recognizes and bargains with a union which only represents a minority of employees in an appropriate unit, the

33. See eg., *Wackenhut Corp.* v. *United Plant Guard Workers of America*, 332 F. 2d 954 (CA 9, 1964); *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 801 (CA 3, 1964);*United States Gypsum Co.* v. *United Steelworkers*, 384 F. 2d 38 (CA 5, 1967), *cert. denied* 389 U. S. 1042 (1968). Indeed, the only Section 301 case that the Sixth Circuit could find where the element was not present was *Monroe Sanders Corp.* v. *Livingston*, 377 F. 2d 6 (CA 2, 1967). However, that case involved a transaction between a parent and subsidiary corporation whereby the parent terminated one subsidiary plant and purchased another. In *Printing Specialties Union No. 447* v. *Pride Papers Aronson Bros. Paper Corp.*, 445 F. 2d 361 (CA 2, 1971), the Second Circuit, as a result of its *Burns* decision, 441 F. 2d 911 (1971), upheld by this Court, distinguished *Monroe Sanders*, and found the new employer not to be a successor when the new employer did not hire a majority of the former employer's employees.

34. Section 9(a), 29 U. S. C. Section 159(a) provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . "

employer commits an unfair labor practice.[35] To require a successor employer to recognize a minority union and arbitrate a dispute with that union is contrary to the basic principles of the Act.

B. The Time for Determining Majority Status Among the Work Force Is When the Employer Has Hired Its Full Complement of Employees.

After determining that a new employer's obligation to bargain requires majority representation among its employees, this Court in *Burns* considered the question of when the obligation matures. The Court held that only when it is "perfectly clear" from the outset that the employer intends to hire all of the prior employer's employees in the bargaining unit does it have an obligation to bargain prior to establishing terms of employment.

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the union as required by Section 9(a) of the Act, 29 U. S. C. Section 159(a)." *Burns, supra,* at 295.

Since, as set forth above,[36] a finding of successorship requires that a majority of those hired by the new employer must have been employed by the predecessor or be union members, then in light of the above statement in *Burns*, it necessarily follows that successorship status does not mature until the union's representative status can be ascertained, *i.e.*, when the full employee complement is hired, unless, of course that determination can be made from the outset, at the time of change of ownership.

However, a new employer who purchases a moribund business and who plans to retain all or a sufficient number of the prede-

35. *Illinois Malleable Iron,* 120 NLRB 451 (1958).

36. Part II, Subpart A, *supra.*

cessor's employees in the unit should nonetheless be accorded considerable freedom to unilaterally vary employment conditions. To unduly restrict an employer's ability to make initial adjustments necessary to convert a marginal business to a profitable one will discourage the purchase not only to the disadvantage of the predecessor but also to his employees. Extended negotiations, perhaps leading to impasse, would certainly hinder putting the business in good order and would not likely result in any benefit to the employees. The benefits to be derived from allowing a reasonable period for employment conditions to be unilaterally adjusted to business needs are substantial, even though an employer initially hired a sufficient number of the predecessor's employees to constitute a majority of his own labor force. Studies and analyses are often necessary before the employer is able to determine what changes in production method or product lines must be made in order to put the business on a profitable basis. Changes in production technique, practices, discontinuation of certain processes or the addition of new ones might be required as a result of such studies. More often than not these production changes necessitate some alteration in employment conditions or other restructuring of the business enterprise. While the employer is in the process of evaluating such business modifications, the work force is operating under the conditions that existed prior to the successor's takeover of the business. If the successor must bargain with the union over changing these pre-existing conditions, he is handicapped in turning the business around and making it viable. If on the other hand he is permitted to make such changes not only is the successor's interest in making the business profitable served, but the employees are benefitted to the extent that the employer is a more secure and stable entity.[37]

37. In *N. L. R. B.* v. *Wayne Convalescent Center*, 465 F. 2d 1039 (CA 6, 1972); the Sixth Circuit recognized the wisdom of according such freedom in interpreting *Burns*. In that case the new employer took over the operations of a nursing home shortly after a union was certified as the representative of the home's employees and before a collective bargaining agreement was executed. Wayne, the

CONCLUSION.

For the foregoing reasons and those urged by the Defendant, it is respectfully urged that this Court reverse the decision of the Court below and in so doing overrule *Wiley*.

Respectfully submitted,

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new employer retained substantially all of its predecessor's employees and the operations of the home continued uninterrupted. Wayne was clearly a successor as the Board and courts have defined the term. Approximately one month after assuming operations, Wayne changed employment conditions without consulting with the union which represented the predecessor's employees. The Sixth Circuit, noting that it was not clear at the time of the change whether Wayne was going to convert the nursing home to a bed and board facility requiring the retention of but a few of the predecessor's employees, concluded that the changes "were merely initial terms of employment established by Wayne." A contrary holding such as the Seventh Circuit rendered in *Bachrodt Chevrolet Co.*, 186 NLRB No. 151 (1970), *enforced in part*, 486 F. 2d 963 (CA 7, 1972), *vacated and remanded*, 411 U. S. 912, 205 NLRB No. 122 (1973) eliminates the important benefits to be derived from allowing for a reasonable period of time for justifiable business adjustment and modification.